Re Cheong Sooi Loong, ex p Hong Leong Finance Bhd

HIGH COURT (KUALA LUMPUR) — BANKRUPTCY NO 43–133–86
VC GEORGE J
23 JULY 1992

Bankruptcy *— Official assignee — Duty of official assignee to balance interest of bankrupt and creditors*

Bankruptcy *— Practice and procedure — Application of bankrupt to reverse refusal of official assignee to grant sanction sought — Whether application properly before the court — Bankruptcy Act 1967 ss 38(1)(a) & 86*

A bankrupt sought to reverse the official assignee's apparent refusal to sanction his application to set aside the judgment in default against him on which the bankruptcy petition was founded. The official assignee had not given a reply to the bankrupt's letters seeking the sanction despite a reminder. The bankrupt's son had undertaken to meet the expenses of maintaining the proposed application and to meet any costs that may be payable in the event the application was unsuccessful.

Held, allowing the application on condition:

(1) The official assignee not replying to the bankrupt's application for sanction amounted to a refusal to grant the sanction sought. Accordingly, the bankrupt's application was properly before the court pursuant to s 86 of the Bankruptcy Act 1967.

(2) The official assignee has to look after not only the interest of the creditors but that of the bankrupt as well. However, in a proper case, balancing the bankrupt's interest and that of the creditors, the sanction could be conditional on provision of security for the expenses and costs.

(3) The refusal of the official assignee to give the bankrupt his sanction was reversed, such reversal being conditional on the deposit, within 14 days, of the sum of $1,500 with the official assignee being the estimated costs that may have to be paid out by the bankrupt in the event his application proved unsuccessful, the deposit to be held as security for the payment of any such costs.

[Bahasa Malaysia summary

Si bankrap memohon untuk menterbalikkan penolakan zahir pegawai pemegang serahhak untuk menyetujui permohonannya untuk mengetepikan penghakiman ingkar terhadapnya atas mana petisyen kebankrapan telah diasaskan. Pegawai pemegang serahhak tidak memberi jawapan kepada surat-surat si bankrap yang memohon persetujuan itu walaupun diberikan satu peringatan. Anak lelaki si bankrap telah mengakujanji untuk membayar perbelanjaan mempertahankan permohonan yang dicadangkan dan untuk membayar sebarang kos yang mungkin kena dibayar sekiranya permohonan itu tidak berjaya.

Diputuskan, membenarkan permohonan itu atas syarat: A

(1) Pegawai pemegang serahhak dengan tidak memberi jawapan kepada permohonan si bankrap untuk persetujuan menunjukkan suatu penolakan untuk memberikan persetujuan yang dipohonkan. Oleh kerana itu permohonan si bankrap dengan betul di hadapan mahkamah mengikut s 86 Akta Kebankrapan 1967.

(2) Pegawai pemegang serahhak mesti memelihara bukan sahaja kepentingan pemiutang tetapi juga kepentingan si bankrap. Akan tetapi, dalam suatu kes yang sesuai, menimbangkan kepentingan si bankrap dengan kepentingan pemiutang, persetujuan itu boleh jadi bersyarat atas pemberian jaminan bagi perbelanjaan dan kos. B

(3) Penolakan pegawai pemegang serahhak untuk memberi si bankrap persetujuannya diterbalikkan, kebalikan itu bersyarat atas pembayaran wang deposit, dalam masa 14 hari, sejumlah $1,500 dengan pegawai pemegang serahhak iaitu kos yang dianggarkan mungkin kena dibayar oleh si bankrap sekiranya permohonannya dibuktikan tidak berjaya, wang deposit itu harus dipegang sebagai jaminan untuk pembayaran sebarang kos seperti itu.] C D

Cases referred to

1 *Re Khoo Kim Hock* [1974] 2 MLJ 29 (folld)
2 *Public Bank Bhd v Hara Industries Sdn Bhd & Anor* [1988] 2 MLJ 618 (refd) E
3 *Supreme Finance (M) Bhd v Koo Sin Ken* [1987] 1 MLJ 296 (refd)
4 *Boaler v Power & Ors* [1910] 2 KB 229 (refd)

Legislation referred to

Bankruptcy Act 1967 ss 38(1)(a), 61, 86 F

Liza Chan (*Liza Chan & Co*) for the judgment debtor/applicant.
Jenny Ee (*Mah & Din*) for the judgment creditor/respondent.
Tengku Muzani bin Tengku Mohamed (Assistant Official Assignee) for the official assignee. G

Cur Adv Vult

VC George J: This is an application by a bankrupt seeking, in effect, to have reversed what tantamounts to a refusal by the official assignee to sanction his applying to the Kuala Lumpur sessions court to have the judgment in default against him on which the bankruptcy petition was founded, set aside. The judgment was for $13,213.91 with interest thereon at 18%pa to be calculated from 30 October 1984 until realization and $431 costs. For the bankrupt it is said that the judgment was irregularly entered, it being contended that the interest ordered was beyond the jurisdiction of the court to award and as such the applicant, it is contended, would be entitled to have the judgment set aside ex debito justitiae. H I

Section 38(1)(a) of the Bankruptcy Act 1967 ('the Act'), pursuant to which the sanction was sought, is as follows:

A Where a bankrupt has not obtained his discharge —

(a) the bankrupt shall be incompetent to maintain any action (other than an action for damages in respect of an injury to his person) without the previous sanction of the Official Assignee.

The bankrupt invokes s 86 of the Act in making this application. Section 86 B is as follows:

If the bankrupt or any of the creditors or any other person is aggrieved by any act or decision of the Official Assignee, he may apply to the court, and the court may confirm, reverse or modify the act or decision complained of and make such order in the premises as it thinks just.

C The bankrupt contends that he is an aggrieved person within the meaning of s 86 and says that the court should reverse the refusal of the official assignee to give him the sanction. Now, apparently there had not been an express refusal by the official assignee. The bankrupt had written to the official assignee seeking the sanction. Inspite of a written reminder the D official assignee apparently did not give any reply to the application. I accept the suggestion of counsel for the bankrupt that the official assignee not replying to his application within a reasonable period tantamounts to a refusal to grant the sanction sought. Accordingly I accept that the bankrupt's application is properly before the court pursuant to s 86 of the Act.

In *Re Khoo Kim Hock,*[1] Mohamed Azmi J (as he then was) in dealing with E the effect of s 38(1)(a) said at p 30:

The first question for determination is whether the requirement of sanction of the official assignee under s 38(1)(a) applies only to a bankrupt's ordinary claims, ie maintaining court action involving third parties, or does it extend to all actions including proceedings, as in the present case, where the bankrupt is F challenging the very validity of the adjudication order by which he has been adjudged bankrupt. Having considered the provisions of the Bankruptcy Act as a whole and the section itself, it is my considered opinion that the sanction requirement does not apply to cases where the bankrupt is seeking to challenge an order in bankruptcy, or where he is applying to be discharged or where he is seeking the court's discretion to review, rescind or vary any order made by it G under its bankruptcy jurisdiction. The exception contained within brackets in s 38(1)(a) clearly indicates that the section is intended to apply only to actions for recovery of something — either real or personal — which can be turned into assets such as a claim for recovery of property or money due.

I can find no reason why the ratio of that judgment of Mohamed Azmi J (as H he then was) should not be extended to a bankrupt applying to set aside the default judgment in which the bankruptcy notice and the petition that followed was based.

The basis of the intended application cannot be said to be frivolous or vexatious. Similar applications were successfully made in *Public Bank Bhd v Hara Industries Sdn Bhd & Anor*[2] and *Supreme Finance (M) Bhd v Koo Sin* I *Ken.*[3]

While it would probably be an uphill task for the bankrupt to satisfactorily explain his allowing the default judgment to be taken and the delay in seeking to apply to set it aside, I could see no reason to hold that the proposed application is not bona fide and accordingly why he should not be

allowed to move the relevant sessions court. Whether the application will be successful is not for this court to speculate on. A

My attention was drawn to *Boaler v Power & Ors*[4] where it was held that while the adjudication remains in force, the bankrupt may not bring an action to set aside a judgment that had been entered against him even though it was the very judgment on which the bankruptcy notice and the petition that followed was based and even though it was alleged that that judgment had been obtained by fraud. The English Court of Appeal was of the view that the cause of action on which the bankrupt's writ was based had passed on to the trustee in bankruptcy. B

In the instant case it is not suggested by the bankrupt that the cause of action on which his application to set aside the default judgment was based had not passed on to the official assignee. He accepts that to be the position but contends, in my judgment correctly, that inspite of that s 38(1)(a) of the Act allows him to proceed with the application but with the previous sanction of the official assignee. C

One misgiving the official assignee has is that should the bankrupt fail in his application it could be dismissed with costs the payment of which could make inroads into such assets that the bankrupt may have in the hands of the official assignee for the benefit of the creditors. Per se that is not a ground for refusing the application for sanction. If the bankrupt's intended application is bona fide and cannot be said to be frivolous and if it has a reasonable chance of succeeding, then even if it means that the estate of the bankrupt should come out with the expenses of the exercise, it seems to me that the official assignee is entitled to allow the expenses to be incurred. Section 61(b) of the Act allows the official assignee to institute or defend any action or other legal proceedings relating to the property of the bankrupt presumably at the expense of the estate of the bankrupt and as s 38(1)(a), as has been seen, allows the bankrupt to maintain any action with the previous sanction of the official assignee it seems to me that such an action maintained by the bankrupt could also be at the expense of the bankrupt's estate. The official assignee has to look after not only the interest of the creditors but that of the bankrupt as well. However, in a proper case, balancing the bankrupt's interest and that of the creditors, the sanction could be conditional on provision of security for the expenses and costs. D E F G

In the instant case the bankrupt's son has come forward to undertake to meet the expenses of maintaining the proposed application and undertakes to meet any costs that may be payable in the event the application is unsuccessful.

The refusal of the official assignee to give the bankrupt his sanction is reversed such reversal being conditional on the deposit, within 14 days of the date hereof, of $1,500 with the official assignee being the estimated costs that may have to be paid out by the bankrupt applicant in the event his application proves unsuccessful, the deposit to be held as security for the payment of any such costs. H I

Application allowed on condition.

Reported by PS Ranjan